IN THE CIRCUIT COURT OF WOOD COUNTY, WEST VIRGINIA

STATE OF WEST VIRGINIA, ex rel.
PATRICK MORRISEY, ATTORNEY GENERAL,
Plaintiff,

v. // **Civil Action No.: 19-C-69**

DIOCESE OF WHEELING-CHARLESTON and
MICHAEL J. BRANSFIELD, in his capacity as
Former Bishop of the Diocese of
Wheeling-Charleston,
Defendants.

CERTIFIED QUESTIONS AND ORDER

On September 10, 2019, came the State Attorney General ("the Attorney General") by its Solicitor General, Lindsay F. See, and its Assistant Attorney General, Douglas L. Davis, and also came the Defendants, Diocese of Wheeling-Charleston and Michael J. Bransfield (at times referred to collectively as "the Diocese"), by their counsel, James C. Gardill, Richard Beaver and Christopher A. Brumley, for hearing on Defendants' Motion to Dismiss the Attorney General's Amended Complaint pursuant to Rule 12(b)(6) of the West Virginia Rules of Civil Procedure.

Whereupon the Court entertained the argument of counsel and upon consideration of same and of plaintiff's first amended complaint, the Diocese's motion to dismiss with supporting memorandum and plaintiff's memorandum in opposition hereby certifies the following questions of law to the West Virginia Supreme Court of Appeals pursuant to W.Va. Code 58-5-2 and Rule 17 of the Rules of Appellate Procedure:

1. Do the provisions of Article 6 of the Consumer Credit and Protection Act, respecting unfair methods of competition and unfair or deceptive acts or practices, apply to

religious institutions in connection with their sale or advertisement of educational or recreational services?

Answer of the Circuit Court: No.

2. Does the cumulative impact of the entire relationship between Church and State arising from the Attorney General's application of the Act constitute an excessive entanglement of Church and State prohibited by the constitutions of the United States and the State of West Virginia?

Answer of the Circuit Court: Yes.

By its Order herein the Court rules upon Defendants' Motion to Dismiss the First Amended Complaint under Rule 12(b) of the Rules of Civil Procedure and STAYS the action pending resolution of the certified questions. The parties are DIRECTED to prepare a joint appendix of the record sufficient to permit review of the certified questions and file same with the West Virginia Supreme Court of Appeals in accordance with Rule 17 of the Rules of Appellate Procedure.

Upon entry of this order the Clerk of this Court shall forthwith transmit the order and a list of the docket entries in the case to the Clerk of the West Virginia Supreme Court of Appeals.

DISCUSSION and RULING:

It is important to note at the outset certain matters on which both parties agree. Counsel for the Attorney General declares that this is not a case seeking to hold the Wheeling-Charleston Diocese liable for past acts of abuse and counsel for the Diocese acknowledges that

child sexual abuse by clerics and others is a serious issue. The parties dispute whether or not the Consumer Credit and Protection Act applies to and regulates parochial and diocesan schools and recreational programs. Anyone looking to exercise righteous indignation about the horrors of child sexual abuse within the Catholic Church will need to look elsewhere than these legal proceedings.

This Court is a court of law, not of public opinion, and its role is to decide questions of law arising from the parties' different views of the purpose, scope and applicability of a specific statute. The issues presented are complex, complicated and consequential; they demand rigorous analysis by the parties and the Court.

Plaintiff's claim as set out in its First Amended Complaint rests on allegations that the Diocese has engaged in unfair and deceptive acts or practices by failing to disclose to potential consumers of its educational and recreational services that in the past it had knowingly employed some priests and laity who had sexually abused children and that it promoted its services in false advertisements respecting the safety of children in its charge by failing to conduct background checks for all employees and volunteers who worked with or otherwise had access to children at its schools and camps. The Attorney General asserts that this conduct violates provisions of the West Virginia Consumer Credit and Protection Act ("the Act") which gives him the authority to commence these proceedings and to seek relief pursuant to the Act.

The Diocese argues that the Act cannot be applied to educational services provided by the Diocese because to do so will infringe upon its internal operational policies and practices and will entangle the State in Church affairs to an extent which the Constitution will not permit. In addition, the Diocese challenges the Attorney General's authority to maintain the subject

civil action against it as the West Virginia Legislature separately regulates Catholic Schools by means of a statutory/administrative framework which supplants and supersedes almost all other statutes, including the Consumer Credit and Protection Act. The Diocese further asserts that the Act prescribes a time limit for the occurrence of conduct which can form the basis of a claim and in this case such limit precludes the Attorney General from commencing this lawsuit.

Underlying these challenges to the Attorney General's claims is the Diocese's position that they constitute an application of the Consumer Credit and Protection Act that is so broad and would secure to his office such extraordinary powers as to render such application unconstitutional.

The Court is not presently asked to decide the merits of the Attorney General's claims. It is asked by the Diocese to dismiss those claims on the basis that they are insufficient to permit any relief under the law. The motion to dismiss is properly granted only if this Court determines that even if every allegation contained in the amended complaint were true the Attorney General would not be entitled to any relief under the Consumer Credit and Protection Act.

The law favors decisions on the merits of a case and a party seeking dismissal for failure to state a claim for which relief may be granted has a heavy burden. The motion to dismiss sets forth several issues and the Court will address each while acknowledging that they are often overlapping and intertwined.

I. IMPACT OF THE CONSTITUTIONAL DOCTRINE OF CHURCH-STATE SEPARATION

Amendment I

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . .

The Diocese insists that the issues raised by the Attorney General's commencement of the instant civil action must be considered in context of the overarching principle of avoiding excessive entanglement of government and religion embedded in the Constitutions of the United States and the State of West Virginia.

The Diocese urges the Court to conclude that the Attorney General's claims entail state intrusion into the operation of Catholic schools because all the claims address, and the false advertising claim is premised on, Church policies and operational practices, including the Safe Environment Program. The Diocese further argues that any remedy appropriate to the Attorney General's claims of failure to warn and failure to disclose inevitably will result in its excessive entanglement with the Church in derogation of the Religion Clauses of the First Amendment.

The vigilance which the U.S. Supreme Court has demonstrated in maintaining a strict view of the constitution's mandate continues to shape this area of law. Historically the religious clauses of the federal constitution have been applied to parochial and religious education in a context of state financial aid to, or for the benefit of, such schools. The unitary decision in *Lemon et al. v. Kurtzman et al., Earley et al. v. Dicenso et al.,* and *Robinson et al. v. Dicenso et al.,* 91 S.Ct. 2105 (1971) addressed constitutional challenges to state aid to religious schools in Rhode Island and Pennsylvania after appeals were taken from decisions of three-judge panels in the District of Rhode Island and the Eastern District of Pennsylvania. The U.S. Supreme Court found the statutes of both states appropriating aid to religious schools to be unconstitutional under the Religion Clauses of the First Amendment.

The decision observed that the parochial school system was "an integral part of the religious mission of the Catholic Church" (*Ibid* at 2113, quoting findings of the District Court) and concluded that "the *cumulative impact of the entire relationship arising under the statutes in each State involves excessive entanglement between government and religion." (at* 2112, emphasis added) The *Lemon* Court declared from the outset that: "Candor compels acknowledgment, moreover, that we can only dimly perceive the lines of demarcation in this extraordinarily sensitive area of constitutional law." Such forewarning has been magnified by decades of horrific sexual abuse of children by priests and the Church's efforts to protect its institutional interests at the expense of its most vulnerable and innocent members, as well as societal changes respecting a proper relationship between government and religion.

The response of the law rightfully has been persistent investigation and severe sanctions for perpetrators, enablers and concealers. In such circumstances it was foreseeable that a will to prosecute claims against the Church and to "push the envelope" would give rise to creative, aggressive theories of liability. While aggressive creativity in construing statutes at times can produce just results it is also apt to entail over-reaching. This risk is amplified when a governmental agency enters into the "extraordinarily sensitive area" of Church-State relations.

Indeed, the *Lemon* decision perceived that "the language of the Religion Clauses of the First Amendment is at best opaque, particularly when compared with other portions of the Amendment." (*Ibid.* at 2111) and admonished:

> Every analysis in this area must begin with consideration of the cumulative criteria developed by the Court over many years. Three such tests may be gleaned from our cases. First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, the

statute must not foster "an excessive government entanglement with religion". (*Ibid* at 2111, quoting from *Walz v. Tax Commission*, 397 U.S. 664(1970).

The decision found the legislative purposes of both State statutes to be secular and without intent or primary effect to advance or inhibit religion. In addition, the Court noted that the two legislatures recognized the significant religious mission of church schools and imposed restrictions to ensure that State financial aid to such schools would support only secular educational functions. It then explained:

> We need not decide whether these legislative precautions restrict the principal or primary effect of the programs to the point where they do not offend the Religion Clauses, *for we conclude that the cumulative impact of the entire relationship arising under the statutes in each State involves excessive entanglement between government and religion. Lemon supra* @ 2111-2112 (emphasis added).

The decision was clear in observing that total separation between church and state is impossible "in an absolute sense" as "[f]ire inspections, building and zoning regulations, and state requirements under compulsory school-attendance laws are examples of necessary and permissible contacts." *Ibid. @ 2112.* It emphasized that: "Judicial caveats against entanglement must recognize that the line of separation, far from being a 'wall', is a blurred, indistinct, and variable barrier *depending on all the circumstances of a particular relationship." Ibid* (emphasis added).

The *Lemon* Court explicitly provided guidance on these issues by declaring:

> In order to determine whether the government entanglement with religion is excessive, we must examine the character and purposes of the institutions that are benefited, the nature of the aid that the State provides, and the resulting relationship

between the government and the religious authority. Mr. Justice Harlan, in a separate opinion in *Walz,* echoed the classic warning as to "programs, whose very nature is apt to entangle the state in details of administration." (Citation omitted). Here we find that both statutes foster an impermissible degree of entanglement. *Ibid @ 2112.*

In the present civil action this Court foresees substantial difficulties in fashioning an appropriate remedy which would be constitutionally benign and is mindful that a statute may be constitutional on its face yet unconstitutional in its application. The Attorney General would have the Court confront such Church-State entanglement issues at the remedy stage of the litigation and essentially advises that sufficient is the day for the evil thereof. The Court finds such an approach unsatisfactory as a line of cases has emphasized that it is not necessary initially to permit application of a statute to parochial or diocesan schools to see whether the application results in Church-State entanglement but it is sufficient to strike down such application that a reasonable likelihood or possibility of entanglement exists. See, e.g., *Catholic Bishop of Chicago v. NLRB,* 559 F.2d 1112 (7th Cir. 1977), affirmed on statutory grounds, 440 U.S. 490 (1979); *Surinach v. Pesquera De Busquets,* 604 F.2d 73 (1979); *Lemon v. Kurtzman,* 403 U.S. 602 (1971); *Serbian Eastern Orthodox Diocese for the United States of America and Canada v. Milivojevich,* 426 U.S. 696 (1976).

The nature and degree of State involvement entailed in any meaningful remedy under the Attorney General's claims are best revealed by the Attorney General's own explanation of how such remedy may unfold:

> The Court: So must it [the Diocese] disclose then on every – let's say – brochure, website, advertisement, communication to promote its schools and camps

that it in the past has employed persons credibly accused of sexual – of a sexual offense?

Counsel: Well, your Honor, first we'd say that the Diocese does not have to advertise at all. The Diocese could avoid this issue; it could decide to never advertise if it doesn't want to deal with this issue.

The Court: But if it does so, would it have to do that?

Counsel: Well, your Honor, part of the answer to that would turn on the way that the facts are ultimately developed in this case. It could be - - - we could imagine a scenario in the future where the Diocese could start fulfilling the promises it makes under its Safe Environment Program, and it does, in fact, have full background checks and training, it does follow the policies about how to deal with credible allegations of abuse.

And in that case, perhaps in the future we can see these disclosures about past violations wouldn't be necessary anymore because it would be - - - because what's happening currently would no longer give parents and other consumers reason to think that the Diocese is not living up to its promises to provide a safe environment.

The Court: And how general or specific must the disclosures be?

Counsel: Well, your Honor, again, this is going to turn on some facts we don't have at this early stage in the proceedings. Part of the way that this Court should interpret what the Diocese future obligations are under the statute is going to be informed by what happened in the past.

The Diocese argues that there are simply a few isolated mistakes that happened decades ago, but as we've shown, the allegations are much more recent than that, especially as this case proceeds. If these allegations turn into a much broader pattern, especially in more recent years, that would certainly inform what the Diocese obligations are going forward.

But some of these questions, we respectfully say, are premature because it depends on facts that we don't know at this early stage.

> What we do know is that the State has alleged that the Diocese has and is continuing to engage in advertising practices that are deceptive, it's not living up to the express promises it makes, and it has not disclosed the extent of facts that would be material to parents and others when they're trying to determine whether the Diocese is providing a safe environment for their children.
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> See, TR. Oral Argument, September 10, 2019, at pp. 66-69.

The Attorney General thus acknowledges that it cannot delineate specifically the remedies it seeks under the Act because that "depends on facts that we don't know at this early stage". It is fundamental, however, that the Complaint must contain sufficient facts which, if true, entitle the Attorney General to relief under the Consumer Credit and Protection Act. Is the Attorney General admitting its factual allegations are insufficient to support relief under the Act? Does it intend to seek permission to file a second amended complaint based on how "the facts are ultimately developed"? Or is he proposing that while the facts alleged in the Complaint are sufficient to warrant relief under the Act, the appropriate remedies cannot be precisely known at this point? The Court understands the last alternative to describe the Attorney General's position but that does not moot the inquiry demanded by *Lemon* into the cumulative impact of the entire Church-State relationship arising from the Act, and determining from all the circumstances of that relationship whether it involves an excessive entanglement of government and religion. The remedies authorized by the Act and appropriate to the Diocese's violations alleged by the Attorney General are substantial aspects of the Church-State relationship created by the Act and relevant to a determination whether that relationship involves excessive entanglement.

Although the precise details of such remedies may be opaque at this point, it is clear that the Attorney General foresees *continuous monitoring and supervision of Diocese communications, including policy statements and procedures, for an indefinite time* which will result in the State's continuing involvement in the relationship between the Diocese (Church) and its prospective students and their families; that an alternative to complying with the State's construction of the Act is the Diocese's cessation of any "advertising" as broadly defined in the Act; that the Attorney General would have authority to determine what "full background checks and training" requires, with judicial review if the Diocese challenges the Attorney General's interpretation; that the Attorney General would monitor and determine whether the Diocese is "fulfilling the promises it makes under the Safe Environment Program", again with judicial review of the nature and degree of such monitoring or if the Diocese objects to the Attorney General's conclusions; and that the Attorney General would have authority to decide when "disclosures about past violations wouldn't be necessary anymore" because the Diocese was "living up to its promises to provide a safe environment".

The availability of judicial review does not overcome the risks of impermissible state intrusion and injects yet another governmental entity into Church-State affairs with on-going power and responsibility to regulate and to manage the Church's relationship with prospective students. In addition, the probability of continued litigation arising from the Church-State relationship created under the Act as applied by the Attorney General is itself a characteristic of excessive entanglement.

Recalling the analysis of the U.S. Supreme Court in *Lemon v. Kurtzman, supra,* the critical question raised is: Does the cumulative impact of the entire Church-State relationship arising

from the Attorney General's application of Article 6 of the Consumer Credit and Protection Act involve excessive entanglement between government and religion?

As the Court proceeds to consider further the issues of the Act's applicability to Catholic educational services, whether the Act is preempted by other statutes, and the claim of false advertising, the cumulative impact of the entire Church-State relationship arising from the Act will become clear. The Court concludes that rather than delaying determination of any part of the constitutional issues presented the better approach is to confront them presently.

II. CATHOLIC EDUCATIONAL SERVICES AND THE SCOPE/APPLICABILITY OF THE ACT

The Diocese contends that Catholic schools are not "goods or services" under the Consumer Credit Protection Act (the "Act") and the way in which the Attorney General has interpreted the Act is so overly broad as to render it unconstitutional in application.

The Attorney General points to the Act's definition of "services", 46A-1-102(47) to include: (a) Work, labor and other personal services; (b) *privileges* with respect to transportation, use of vehicles, hotel and restaurant accommodations, *education,* entertainment, recreation, physical culture, hospital accommodations, funerals, cemetery accommodations, and the like; and (c) insurance, in support of its position that the Act applies to Diocesan and parochial schools.

The Diocese argues that the term "privileges" in 46A-1-102(47) contains a clear limiting effect on the reach of the Act in addressing services such as education, lodging, hospital accommodations, funerals and the like and implies a commercial credit context. The Diocese cites the definition of "credit" in the same section of the Act, 46A-1-102(17), to mean the

privilege granted by a creditor to a debtor to defer payment of debt or to incur debt and defer its payment, in support of its position that only matters of credit or deferred payment in connection with educational and the other services listed are encompassed by the term and therefore governed by the Act. Additionally, Black's Law Dictionary defines "privilege" in civil law as a creditor's right to priority over a debtor's other creditors.

In response, the Attorney General argues that in its most common usage "privilege" is defined in Black's Law Dictionary as "a special legal right, exemption, or immunity granted to a person or class of persons; an exception to a duty." However, eleven specific kinds of such privileges are described under this usage, none of which are apt to the categories listed in 46A-1-102 (47). In addition, if the Attorney General is correct "that the Legislature intended for the statute to describe a 'right' with respect to education" it simply could have so written. While the Court finds the Diocese's position more persuasive, it is certain only that the definition of "services" is ambiguous.

The Attorney General correctly explains that his claims are based on alleged violations of Article 6 of the Act, which governs general consumer protection in sales of services offered for cash or credit. There can be no doubt that the Act, through Article 6, applies to consumer transactions and sales where neither credit nor privileges are involved. This conclusion does not settle the question whether the general consumer protection provisions in Article 6 apply to education and recreation services provided by diocesan and parochial schools. The question can be answered only through a comprehensive analysis of the constitutional prohibition against Church-State entanglement and the issue of preemption by other state statutes and regulations.

The decision in *State ex rel. Morrisey, Attorney General v. Copper Beech Townhome Communities ("Copper Beech")*, 239 W.Va. 741 (2017) provides insight as well as a method for properly construing ambiguous statutes. It also exemplifies how the issues of Church-State entanglement, the proper scope of the Consumer Credit and Protection Act and preemption by other State statutes are intertwined.

In *Copper Beech* the Attorney General brought an action under the Act, including specifically Article 6, against a landlord for the same relief he seeks in the instant proceeding: injunction, restitution, disgorgement, civil remedies and other equitable relief. The Complaint alleged that landlord had entered into residential leases that violated the Act's debt-collection provisions and deceptive-practices provisions. The decision provides a roadmap for statutory construction which begins with an examination of the statutory language to determine if it is ambiguous and proceeds with a method for construction where ambiguity is found.

Though not central to the decision the Court found the lead sentence of the opinion noteworthy: "In this matter we address whether our consumer credit protection statute applies to and regulates *the relationship between* a landlord and tenant under a lease for residential real property." Borrowing from Justice Ketchum the matter this Court addresses is whether Article 6 of the Act applies to and regulates the relationship between the Diocese and students, and their parents, considering enrollment in diocesan and parochial schools and camps.

Copper Beech observed that the CCPA, enacted in 1974, "is a hybrid of the Uniform Consumer Credit Code and the National Consumer Act and some sections from then-existing West Virginia law" and its underlying purposes are to protect consumers and to promote sound and fair business practices. @ 175. It also quoted from the same law review article written by

Professor Cardi and cited by both parties, which described the five intended purposes of the Act, only the last of which is relevant to consumer purchases where credit is not involved: "protect consumers who purchase goods or services for cash or credit from, and give to them remedies for, defective or shoddy goods or services and unfair and deceptive selling practices." V.Cardi, *The West Virginia Consumer Credit and Protection Act,* 77 W.Va. L. Rev. 401, 402 (1974-75).

The decision then remarked:

> In researching the background and purpose underlying the CCPA, we have found no reported West Virginia cases, law review articles, or secondary sources stating that the purpose, or even a purpose, of the Act is to regulate fees that a landlord may charge to a tenant pursuant to a residential lease. In fact, in the forty-three years since the CCPA was enacted, this case is the first occasion in which any party has asserted before this Court that the Act applies to and regulates the landlord-tenant relationship. *Cooper Beech supra* @ 175-176.

The Diocese has noted that in the now forty-four years since passage this is the first occasion anyone has claimed that the Act applies to and regulates the Diocese's relationship with students (and their families) and prospective students (and their families).The landlord in *Copper Beech* advanced two arguments presented by the Diocese: that a landlord's business of renting residential property to a tenant is not the kind of conduct regulated by the Consumer Credit Protection Act and that such business is already subject to extensive statutory and regulatory oversight.

The decision proceeded to review the rules of statutory construction beginning with a

determination whether a statute is clear and unambiguous or requires interpretation because of ambiguity. *Copper Beech* found the Consumer Credit Protection Act ambiguous in its provisions respecting debt collection and unfair and deceptive practices, thereby demanding judicial construction and declared:

> When a statutes language is ambiguous, a court often must venture into extratextual territory in order to distill an appropriate construction. Absent explicatory legislative history for an ambiguous statute . . . this Court is obligated to consider the . . . overarching design of the statute. *Cooper Beech* @ 178, quoting *State ex rel. McGraw v. Scott Runyan Pontiac-Buick, Inc.*, 194 W.Va. 770, 777 (1995).

While the Consumer Credit Protection Act does not contain an explicit indication that it applies to a residential lease or real property, the *Copper Beech* Court found that the legislature had enacted extensive, detailed statutory law regulating the landlord-tenant relationship and cited several statutes which provided "*explicit* statutory direction on our landlord-tenant law". *Ibid.* @ 179.

The State Supreme Court concluded:

> Because the landlord-tenant relationship is so pervasively regulated in these numerous statutory sections outside of the CCPA, we are compelled to conclude that the legislature did not intend to further regulate the landlord-tenant relationship in an ambiguous provision of our CCPA. Instead, it is clear that when the legislature intends to address the relationship between a landlord and tenant in a particular statute, it does so explicitly. *Ibid.*

In addressing the Act's unfair or deceptive practices provisions contained in Article 6, *Copper Beech* observed that the Court construed these provisions in *State ex rel. McGraw v.*

Bear, Stearns & Co., Inc., supra, and found them "among the most ambiguous provisions of the consumer protection act". *Ibid* @ 181-182. The decision then concluded: "As with our analysis of the debt collection provisions of the CCPA, we find that an examination of the Act as a whole reveals that the deceptive practices provisions do not apply to and regulate residential leases of real property entered into by a landlord and tenant." @ 182.

The decision delineated five reasons for this conclusion:

1. Article 6 includes no *explicit* direction stating that the deceptive practices provisions apply to the landlord-tenant relationship;
2. When the legislature intends for a statute to apply to the landlord-tenant relationship it does so explicitly;
3. The origin, history and purposes of the Act indicate it was not intended to apply generally to and regulate residential leases of real property between a landlord and tenant;
4. The legislature may amend the deceptive practices provisions and decide explicitly to include residential leases of real property; and,
5. The decision in *Teller v. McCoy,* 162 W.Va. 367 (1978) did not support the Attorney General's position.

Mindful that the complex constitutional issues of Church-State entanglement were entirely absent from the *Copper Beech* analysis, one can appreciate how the decision affects an inquiry of the Act's applicability to religious schools.

In light of *Copper Beech's* analysis and conclusions the legislature's declaration of the purpose and proper construction of Article 6 of the Act is instructive:

(1) The legislature hereby declares that the purpose of this article is to complement the body of federal law governing unfair competition and unfair, deceptive and fraudulent acts or practices in order to protect the public and foster fair and honest competition. It is the intent of the legislature that, in construing this article, the courts be guided by the interpretation given by the federal courts to the various federal statutes dealing with the same or similar matters. To this end, this article shall be liberally construed so that its beneficial purposes may be served.

(2) It is, however, the further intent of the legislature that this article shall not be construed to prohibit acts or practices which are reasonable in relation to the development and preservation of businesses or which are not injurious to the public interest, nor shall this article be construed to repeal by implication the provisions of articles eleven [47-11-1 et seq. repealed], eleven-a [47-11A-1 et seq.] and eleven-B [47-11B-1 et seq.], chapter forty-seven of this Code. W.Va. Code 46A-6-101

The only federal statute and federal court decisions discussed by either party which address unfair or deceptive acts or practices, unfair competition or false advertising, are the National Labor Relations Act, *Catholic Bishop of Chicago v. NLRB,* 559 F.2d 1112 (7th Cir. 1977) and *Catholic High School Ass'n of Archdiocese of New York v. Culvert,* 753 F.2d 1161 (2nd Cir. 1985). Interestingly, these two federal appellate court decisions reached opposite conclusions on whether the National Labor Relations Act may be applied to diocesan and parochial schools without violating the religious clauses of the Constitution.

The second subsection of the Consumer Credit Protection Act is restrictive in its explicit directive that the Act "*shall not be construed* to prohibit acts or practices which are reasonable in relation to the development and preservation of businesses . . .". Court decisions have

provided guidance as to how this mandate applies to religious educational institutions by recognizing that a legitimate, central purpose of such institutions is to evangelize a faith and to preserve and development its membership. The *potential deleterious effects* on the Diocese's legitimate interests in these respects is therefore a necessary factor to consider in construing the Act and the limits of its permissible application. See, *e.g., The Catholic Bishop of Chicago v. NLRB, supra,* and *Surinach, supra.*

The Attorney General refers the Court to *Mountain State College v. Holsinger,* (*"Mountain State")* 742 S.E.2d 94 (W.Va. 2013) to demonstrate that the West Virginia Supreme Court has recognized that the provision of educational services is within the meaning of "services" under the Act. The college is a for-profit institution providing various courses of study. Graduates of the college alleged in their complaint that the college had induced them to enroll by verbal guarantees they would find jobs upon successful completion of its legal assistance program. Graduates who successfully completed the program were unable to find jobs as legal assistants. The graduates claimed that the college violated Article 2 of the Consumer Credit and Protection Act which addresses consumer credit protection and specifically governs a "consumer credit sale" including a sale of services in which credit is extended for services purchased primarily for a personal, family, household or agricultural purpose. The violation asserted was that of inducement by unconscionable conduct with respect to a consumer credit transaction under 46A-2-121.

At trial, after the students closed their case-in-chief, the college moved for judgment as a matter of law. The circuit court granted the motion with respect to the fraudulent inducement claims but allowed the unconscionability claim to go to the jury. On appeal the

college asserted that the trial court erred in finding that it had violated W.Va. Code 46A-2-121 because that section of the Act applied only to creditors and a third party, not the college, was a creditor.

The decision limited itself to the specific issue whether the enrollment agreement between the parties constituted a "consumer credit sale" under the Act and determined it did not. The *Mountain State* Court reasoned that the meaning of the relevant statutory provisions was clear so that it must be accepted without resort to the rules of statutory interpretation. The decision concluded that the plain meaning of "consumer credit sale" under the Act was that it must entail a grant of credit "either *by a seller* who regularly engages as a seller in credit transactions of the same kind or pursuant to a *seller credit card.*" Black's Law Dictionary was also cited by the decision in support of this definition. The holding was stated thus:

> To put it simply, the college as the seller of educational services did not extend credit to the respondents for the payment of those services. As a result, the enrollment agreement between the respondents and the college does not meet the definition of a consumer credit sale under W.Va. Code 46A-1-101(13)(a)(i). Accordingly, the respondents do not have cognizable causes of action for unconscionability and inducement by unconscionable conduct pursuant to W. Va. Code 46A-2-121, and the circuit court's ruling to the contrary constitutes error.
> *Mountain State, supra, at* 100-101.

This Court does not agree that the decision in *Mountain State* amounts to a recognition that the provision of educational services is a "service" within the meaning of the Consumer Credit Protection Act as it did not address whether the Act applied generally to the college's education services but was decided on the narrower ground that the enrollment

agreement did not entail a "consumer credit sale" under the Act. This Court recognizes, however, that the decision clearly implies that had the college been a creditor of the students it enrolled then the provisions of Article 2 of the Act would apply. Nevertheless, that does not demonstrate that educational services are subject to the general consumer protection provisions of Article 6, and even if they were, that those provisions apply to and regulate religious schools.

The Attorney General cites other decisions in support of its view that Article 6 of the Act applies to and regulates educational services. In *Petruska v. Gannon University,* 462 F.3d 294 (2006), a former chaplain for a Catholic diocesan college sued it for gender discrimination and retaliation in violation of Title VII, civil conspiracy, negligent retention and supervision, fraudulent misrepresentation and breach of contract. The federal appeals court held that the Religion Clauses of the federal constitution operated to bar all the plaintiff's claims except her fraudulent misrepresentation claim under state tort law and her breach of contract claim. None of Plaintiff's claims were founded upon a statute with the same or similar provisions as the Consumer Credit Protection Act.

The decision explained that unlike the claims which were barred under the First Amendment, Plaintiff's fraudulent misrepresentation claim turned "upon the truth or falsity of the assurances that she would be evaluated on her merits when she was initially appointed as University Chaplain in July 1999." *Petruska* @ 310. The Third Circuit Court recited the elements of fraudulent misrepresentation: a misrepresentation, a fraudulent utterance thereof, an intention by the maker that the recipient will thereby be induced to act, justifiable reliance by the recipient upon the misrepresentation and damage to the recipient as the proximate result.

The Plaintiff's factual allegations were taken as true for purposes of Defendant's motion to dismiss and she alleged that as she was the first female in Gannon's history to serve as University Chaplain she sought specific assurances from the University that she would not simply be replaced when the former Chaplain returned from a sabbatical or if another qualified male became available and the University assured her that future decisions regarding her tenure as chaplain would be based solely on her performance, not her gender. The *Petruska* Court determined that the state's prohibition against fraud did not infringe on Gannon's First Amendment protections so that resolution of her fraud claim would not violate those protections.

Similarly, the decision also determined that contractual obligations are entirely voluntary so that "[a] church is always free to burden its activities voluntarily through contract, and such contracts are fully enforceable in civil court." *Petruska* @ 310, quoting *Minker v. Baltimore Annual Conference of United Methodist Church,* 894 F.2d 1354, 1360, (D.C.Cir.1990).

The circumstances of the present case are distinguished from those in *Petruska*. The latter entailed an individual's claims sounding in tort and in contract arising from a discrete employment transaction between an employer and employee. There was absolutely no state involvement nor was the state prosecuting any claim. The Attorney General's claims in the present proceeding, in contrast, represent the State's attempt to prosecute a religious entity, the Diocese, under a general consumer protection statute for acts, statements and omissions outside of any individual or commercial transaction, which the State's Attorney General deems violations of statutory provisions.

Further, the difference between the circumstances of the two cases is demonstrated by the fact that in the case now before this Court the Attorney General has made no claim for tortious fraudulent misrepresentation or breach of contract nor reasonably could he make such claims, and no individual consumer, potential consumer, student or parent or potential student or parent has made such claims against the Diocese nor any claims under the consumer protection statutes.

The case of *Alsides v. Brown Institute, Ltd.*, 592 N.W.2d 468 (Minn. 1999) is more relevant to these proceedings than *Petruska*. Enrolled students in a private, for-profit trade school brought claims against the school alleging breach of contract, fraud, misrepresentation and violations of Minnesota's Consumer Fraud and Uniform Deceptive Trade Practices Acts. The Court of Appeals held in pertinent part that allegations the school failed to deliver on specific promises and representations stated claims for fraud, misrepresentation or breach of contract and that classes and course instruction were a "service" under Minnesota's Consumer Fraud and Uniform Deceptive Trade Practices Act.

Alsides supports the Attorney General's position in the instant proceeding, though as an out-of-state decision it is not controlling; the Minnesota Court of Appeals declared:

> Contrary to the district court's ruling, nothing in the statute or caselaw precludes application of the act to educational services provided by a private, proprietary, for-profit educational institution. By paying tuition, students have purchased an educational service. We therefore conclude that classes or course instruction provided by a private, proprietary, for-profit educational institution constitute a "service" or "intangible" under the consumer fraud act. *Alsides* @ 474-475.

The claims and circumstances present in the case before this Court are distinguished

from those addressed in *Alsides* and in *Malone v. Academy of Court Reporting*, 582 N.E.2d 54 (Ohio 1990), also cited by the Attorney General. The Attorney General relies principally on statements contained in the Diocese's Safe Environment Program as the Diocese's "promises and representations" which he claims were breached or were false, while the student cases rely on school representations ancillary to enrollment agreements or on statements specifying the educational services to be provided by them and which are separate from policy and procedures.

The Diocese's Safe Environment Program entails a statement of policies and a program to effectuate them with specific structures and procedures. The Diocese's website describes the Program which was established to implement the U.S. Roman Catholic Bishops' Charter for the Protection of Children and Young People. It created distinct offices and procedures to report abuse and misconduct, identified to whom reports may be submitted, including civil and Diocesan authorities, established an independent lay board to review all allegations and staffed the program with full time employees to gather abuse allegations, educate clergy, employees, volunteers, lay people, students and teachers on reporting procedures and how to identify warning signs of abuse. The Charter and its Safe Environment Program serves as a framework for confronting and overcoming the issues of child sexual abuse and related deficiencies. It was adopted voluntarily and intended to be applied throughout the United States.

Both *Alsides* and *Malone* involved former students who had a contractual relationship with their schools. Their claims alleged that the schools had breached specific promises and made specific misrepresentations respecting accreditation, classes offered, instructional hours, curriculum and other matters central to the education programs entailed in their enrollment

agreements. The students stated claims of breach of contract and misrepresentation and also violation of consumer protection laws prohibiting unfair or deceptive practices or acts.

The unfair or deceptive practice alleged by the Attorney General – that the Diocese failed to warn or to disclose that in the past it had hired individuals credibly accused of child sexual abuse, is different in kind and character from the acts and practices alleged in *Alsides* and *Malone*. Likewise, the Attorney General's allegation that the Diocese breached its promise or representation to screen employees and conduct background checks on them by failing to do so in a fraction of cases is different in kind and character from the breaches of promises or representations alleged in *Alsides* and *Malone*.

The alleged violations of consumer protection laws in the student actions against their schools can be objectively determined and injunctive relief can be precisely and objectively formulated and enforced. In contrast, the critical determination whether the Diocese has failed to fulfill the promises/representations contained in its Safe Environment Program is in large part a subjective decision: in connection with "screenings" and "background checks" does a single instance of non-compliance constitute an actionable misrepresentation or a deceptive practice? What percentage of non-compliance is the standard for determining a deceptive practice or breach of promise? In connection with the alleged "failure to warn" or "failure to disclose" the Court has previously discussed some of the issues arising from these allegations in a context of injunctive relief and which, at least in part, are due to the vagueness and potential for over-reaching in these claims.

Finally, as in the *Mountain State* case, even if Article 6 of the Act applies to private, for-profit educational services that does not mean it applies to and regulates religious schools.

III PREEMPTION OF THE CCPA BY OTHER STATUTORY/REGULATORY FRAMEWORKS

As preemption principally relates to supplanting state law by federal statute and is grounded in the supremacy clause of the federal constitution, it is more precise in analyzing the effect of different state statutes on one another to do so in terms of statutory construction to determine legislative intent as to whether one or the other or both statutes apply to and regulate a specific subject matter or relationship. Nevertheless, decisions addressing federal preemption of state law are of value even in the purely state law context.

The Attorney General argues that application of the Consumer Credit Protection Act to the relationship between the Diocese and its students and parents and prospective students and parents as "consumers" of its educational services, is not precluded by other statutes regulating education. He relies for support on *Tipton v. Secretary of Education of the United States,* 768 F.Supp. 540 (S.D.W.Va. 1991) where students with loans through the guaranteed student loan program claimed that their obligations were unenforceable due to violations of West Virginia's Consumer Credit Protection Act and that Article 2 of the Act made the original lenders and their assignees, the Higher Education Assistance Foundation ("HEAF") and the Secretary of Education, subject to the claims and defenses which the students could assert against Northeastern Business College.

The defendant lenders and HEAF sought to dismiss the students' claims arguing that state law defenses under the Consumer Protection Act were unavailable to the students because state law was preempted entirely by the federal law embodied in the Higher Education Act. The district court recognized that its sole task was to ascertain the intent of Congress. The

intent to preempt may be expressed explicitly or it may be inferred if the scheme of federal regulations "is sufficiently comprehensive to make reasonable the interference that Congress 'left no room' for supplementary state regulation. . . As a third alternative, in those areas where Congress has not completely displaced state regulation, federal law may nonetheless pre-empt state law to the extent it actually conflicts with federal law." *Tipton* @ 551.

There was no contention that Congress had explicitly preempted state law by enacting the Higher Education Act so the question was whether preemption could be inferred by the nature and extent of federal regulation.

The students acknowledged that the federal statutory and regulatory framework was extensive but argued that this did not warrant a finding of preemption of state law and the two regulatory schemes were not in conflict on the specific, discrete issue of whether guaranteed student loan program lenders with a close connection to a participating school were subject to state law claims and defenses and such a statutory construction was neither inconsistent with federal interests underlying the Higher Education Act nor a hindrance to lender participation in the student loan program. The district court went on to determine that Congress did not impliedly intend to preclude supplementary state regulation and that availability of defenses under the state consumer protection act did not conflict with the federal Higher Education Act.

Accordingly, the federal district court deciding *Tipton* held "that only limited portions of the state statutory law relied upon by plaintiffs to subject the bank defendants to the students' school related defenses are preempted. . ." @ 563 and "that the plaintiffs have stated valid, non-preempted theories upon which the defendants may be held subject to the students' school related defenses under certain portions of state statutory law." @570.

The Diocese frames the issue in the following manner: "...the Attorney General is overreaching in attempting to use ambiguous provisions of consumer laws to address historical misconduct of certain priests and employees under the guise of an ambiguous duty to warn or failure to disclose. Thus, he seeks to insert himself into issues covered by other more specific statutes, over which he has no jurisdiction, such as the mandatory reporting requirements of West Virginia law dealing with abuse of minors and the operation of safe schools, both of which have specific statutory structures assigning that responsibility to others and providing specific venues and avenues for recourse and disclosure." TR. Oral Argument, Sept. 10, 2019, @ 10-11.

The Court has discussed *Copper Beech* in some detail and the decision offers guidance on the issue of "preemption". Applying its analysis the Court concludes that the deceptive practices language in 46A-6-102(L) and (M) is ambiguous as it is "susceptible of two or more constructions or of such doubtful or obscure meaning that reasonable minds might be uncertain or disagree as to its meaning." *Copper Beech, supra* @ 176-177. Being ambiguous, the statute must be construed before it can be applied.

Under our rules of statutory construction "[t]he primary object in construing a statute is to ascertain and give effect to the intent of the Legislature." *Ibid.* @ 178, quoting with approval Syl. Pt. 1, *Smith v. State Workmen's Comp. Comm'r,* 194 W.Va. 770, 777 (1975).

In ascertaining legislative intent where two or more statutes arguably regulate the same field, business or relationships, a court must recognize that a legislature may explicitly or implicitly establish that only one statute shall apply to and regulate a particular field, business or relationship. Alternatively, the legislature may intend that one statute supplant another only where they are inconsistent or that it intends one statutory framework to have primary but not

exclusive jurisdiction of the subject matter. See *Copper Beech, supra,* and also, *State ex rel. McGraw, Jr., Attorney General v. Bear, Stearns & Co., Inc.,* 618 S.E.2d 582 (W. Va. 2005).

Consequently, it is significant that nowhere in the Consumer Credit Protection Act does it explicitly indicate that the provisions of Article 6 apply to religious schools and camps. In contrast, W.Va. Code Chapter 18, addressing Education generally, contains Article 28, with specific provisions respecting private, parochial or church schools, including 18-28-6, which explicitly directs:

> No private, parochial or church school or school operated by any other religious group or body as part of its religious ministry or other nonpublic school which complies with the requirements of this article shall be subject to any other provision of law relating to education except requirements of law respecting fire, safety, sanitation and immunization.

In addition, Chapter 18 establishes a State Board of Education and a Superintendent of Schools with authority to promulgate rules addressing the wide range of matters relevant to education. Certain sections of the Chapter explicitly apply to religious schools, including 18-8-1(b) which provides:

> A child is exempt from the compulsory school attendance requirement set forth in section one-a of this article if the requirements of this subsection, relating to instruction in a private, parochial or other approved school, are met. The instruction shall be in a school approved by the county board and for a time equal to the instructional term set forth in section forty-five [18-5-45], article five of this chapter. In all private, parochial or other schools approved pursuant to this subsection, it is the duty of the principal or other person in control, upon request of the county superintendent, to furnish to the county board such information and records as may be required with respect to attendance, instruction and progress of students enrolled.

In *State ex rel. McGraw v. Bear, Stearns & Co., Inc. supra,* the West Virginia Supreme Court of Appeals held that the Attorney General did not have authority under 46A-6-104 to bring an action based upon conduct that was ancillary to a business governed by other statutory requirements, such as buying and selling securities. In the present case, the Diocese's Safe Environment Program and its conduct and statements describing and implementing it are auxiliary and subordinate to its provision of educational and recreational services which, as explicitly set out in *Lemon, supra* @ 2113, is ancillary to its religious mission.

As respects child abuse the legislature has enacted specific and comprehensive statutes and regulations in this area including, but not limited to, mandatory reporting of suspected abuse (49-2-803), educational and training programs for mandatory reporters (49-2-805), penalties for failure to report (49-2-812), and criminal and civil proceedings (61-8B-1 et seq., 61-8D-1 et seq. and 49-4-601 et seq.).

Finally, the overarching design of Chapter 18, Article 28 and the specific context in which the term "safety" is included along with "fire", "sanitation" and "immunization" as subjects excluded from the explicit preemption of any other provision of law relating to private, parochial or church schools, supports a view that laws relating to "safety" are intended to encompass statutes and regulations such as building codes, room capacity, water quality, hazardous substances, asbestos abatement and the like and not the Consumer Credit and Protection Act or other laws addressing advertising or consumer protections.

IV STATUTE OF LIMITATION

The Diocese asserts the limitation of actions contained in 46A-5-101(1) as a bar to the Attorney General's claims under the Act. In pertinent part that section declares:

> With respect to violations arising from consumer credit sales or consumer loans made pursuant to revolving charge accounts or revolving loan accounts, *or from sales as defined in article six [46A-6-601 et seq.] of this chapter, no action pursuant to this subsection may be brought more than four years after the violations occurred.*

The Diocese argues that the Complaint's allegations of sexual abuse by its priests, agents, employees or volunteers constitute the "predicate acts" underlying the Attorney General's claims that the Act has been violated. It points out that all abuse instances contained in the Complaint occurred beyond the four years next preceding the Complaint's filing. This argument misapprehends the Attorney General's claims which allege that the Diocese violated the Act by its false advertising, unfair methods of competition and unfair or deceptive acts or practices, including its concealment, suppression or omission of material facts not by any acts of sexual abuse. The Attorney General alleges that this conduct continues to the present and therefore his claims are timely and not barred by the four-year period of limitations.

Moreover, an assertion that a claim is time-barred by an applicable statute of limitation is an affirmative defense to be pled in response to a complaint and may warrant a motion for summary judgment upon an adequate record, but is properly not to be determined in a Rule12(b) motion to dismiss. Accordingly, the Diocese's motion to dismiss on grounds that the Attorney General's claims are time-barred is DENIED.

V UNFAIR COMPETITION AND UNFAIR OR DECEPTIVE ACTS OR PRACTICES/FAILURE TO DISCLOSE OR TO WARN/ ADVERTISED SERVICES NOT DELIVERED

These three claims for relief are based on the theory that on its website the Diocese advertised, promised and represented that it offers a safe learning environment in its schools and recreational camps but failed clearly and conspicuously to disclose that the learning environment is not safe as advertised due to historical claims of sexual abuse of minors by priests and certain lay employees and failed to conduct adequate background checks on prospective employees and agents. The First Amended Complaint explicitly makes these claims under 46A-6-104, which provides:

> Unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce are hereby declared unlawful.

It is not a coincidence that this very section of the Consumer Credit and Protection Act has been recognized as "among the most ambiguous provisions of the consumer protection act." *Bear Stearns, supra* at 585. Moreover, the Complaint sets out these claims in a convoluted manner. Paragraphs 139 – 162 allege that the Diocese advertised on its website that "Providing a safe learning environment is inherent in the mission of our Catholic schools." (Quoting from the Safe Environment Program), but that it "has a long history of not always" providing a safe environment and failed to "adequately investigate" priests and prospective employees and to conduct criminal background checks "for all employees" and after learning of past child sexual abuse failed to disclose such misconduct.

The Attorney General then alleges that the Diocese failed "and continues to fail, to clearly and conspicuously disclose that the learning environment it provides for children *is not*

as safe as advertised" which violates 46A-6-104 as defined by 46A-6-102(7)(L) and (M) and that the Diocese and Bishops "fail" (present tense) "to safely deliver the educational and recreational services provided as advertised" which violates 46A-6-104 as defined by 46A-6-102(7)(I) and (L).

Given the prior discussion and review of the law respecting the prohibition against excessive Church-State entanglement and the related mandate that courts consider the cumulative effects of the entire Church-State relationship arising from application of a statute to a religious institution in determining whether it is constitutionally infirm, these allegations and claims are striking in several respects. They rest on multiple premises that the Attorney General has power under the Act to prosecute religious schools which are "not as safe as advertised" based on past conduct and a present failure to disclose it; that the Attorney General may consider a religious institution's published mission statement, policy goals and implementing program as establishing a standard which any failure to meet constitutes an "unfair method of competition and an unfair or deceptive act or practice" and an unlawful violation of the Act; that the legislature intended the Attorney General to monitor "advertisements", as broadly defined, of religious schools, including mission or policy statements accompanied by a program to implement the same, to determine if a religious institution has failed to fulfill "promises or representations" contained in such "advertisements", to decide when a religious institution must warn of and disclose to prospective students and parents, past misconduct of its clerics and employees; to formulate or approve specific contents of such warnings and disclosures and to decide and declare when such warnings and disclosures are no longer required.

The nature and degree of the powers claimed by the Attorney General, which he contends the legislature intended he exercise by enactment of the Consumer Credit and Protection Act, may be appreciated by examining how they would operate in a purely secular context.

The Attorney General argues that the Act is neutral and of general application as it requires any educational institution to provide adequate information to consumers that will allow them to make informed choices about the safety of their educational and recreational services for minors. The Attorney General acknowledges that the Act is not limited to safety issues related to minors nor is it restricted to information about sexual abuse. TR. Oral Argument, September 10, 2019, at p.60. Indeed, the Attorney General admits that the Act covers the disclosure or concealment of any material facts relevant to the safety of services being offered for sale and may extend to whether current or former employees of a business, school or other institution have been convicted of a sexual offense against an adult, or of domestic violence, or an offense involving controlled substances or any felony. TR. at p. 61.

The Act's definition of "unfair methods of competition and unfair or deceptive acts or practices" includes, but is not limited to, "[a]dvertising goods or services with intent not to sell them as advertised" (46A-6-102(I)), "[e]ngaging in any other conduct which similarly creates a likelihood of confusion or misunderstanding" (46A-6-102(L)) and "[t]he act, use or employment by any person of any deception, fraud, false pretense, false promise or misrepresentation, or the concealment, suppression or omission of any material fact with intent that others rely upon such concealment, suppression or omission, in connection with the sale or advertisement of

any goods or services, whether or not any person has in fact been misled, deceived or damaged thereby" (46A-6-102(M)).

In order for consumers to make an informed choice about the safety of a hospital would not it be material whether any current or former employee had been convicted of domestic violence, a sexual offense, a crime of violence, a drug offense or had received treatment for drug addiction, or successfully been sued for medical malpractice? Would it not also be material whether any patient had died or developed a staph infection while at the hospital?

When advertising would physicians and other health care providers have a duty to disclose negative results, credible accusations, judgments or settlements of medical malpractice and morbidity rates of patients treated for various diseases, injuries and conditions?

Would nursing homes, rehabilitation facilities, residential treatment centers for juveniles or for addiction likewise be subject to these same requirements?

Would every business of any kind likewise be subject to the same requirements and required to disclose all "material facts" regarding the past conduct of employees and former employees and instances of harm or injury in the use of goods or services it offers for sale?

The list is inexhaustible; the powers of the Attorney General almost boundless and effectively would grant his office profound influence over every aspect of the state's economy.

It is inconceivable that this was the legislature's intent in enacting the Consumer Credit and Protection Act.

CONCLUSION:

Though it has been almost fifty years since *Lemon v. Kurtzman, supra,* was decided its holding remains "good law". Moreover, this Court has attempted to glean as much guidance as possible from its thoughtful analysis, which is more relevant to the present proceeding than its specific ruling respecting state financial aid to religious schools.

It remains as true today as it did in the 1970's that religious schools are "an integral part of the religious mission of the Catholic Church". *Lemon, supra.* at 2113. The intimate, mutually advantageous relationship between religious schools and the ecclesiastical institutions which they serve is vital to all churches and faiths. Propagation of the faith and preservation of its membership are not accidental or tangential purposes of religious schools but essential to their existence.

As it was long before the time of *Lemon*, is now and will be in the future, honest humility commands acknowledgement "that we can only dimly perceive the lines of demarcation in this extraordinarily sensitive area of constitutional law." *Lemon, supra* at 2111.

This Court also recognizes that culture and societies change and these changes are often reflected in our jurisprudence. Views toward the Church-State relationship are affected by the growth of government and its reach into the wide range of human activity. Moreover, the lines between religion, culture and politics have become increasingly blurred to a point where some demand political supremacy for religious tenets while others seek to marginalize religion from all aspects of our society. Court decisions respecting the constitutional issues raised in these proceedings also vary and delineating a bright line between permissible and impermissible

governmental involvement in church related matters is not possible. Indeed, we see now through a glass, darkly (1 Corinthians 13-12) yet we must continue to move forward.

Lemon continues to be quoted with approval, at least as to its admonishment that:

> Every analysis in this area must begin with consideration of the cumulative criteria developed by the Court over many years. Three such tests may be gleaned from our cases. First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, the statute must not foster "an excessive government entanglement with religion". *Ibid.* at 2111.

Lemon emphasizes that the difference between permissible government involvement with religion and excessive entanglement depends on the totality of the circumstances of a particular relationship. At 2112.

Two decisions subsequent to *Lemon* exemplify the different conclusions courts have reached in addressing these first amendment issues. In *DeMarco v. Holy Cross High School,* 4 F.3d 166 (2nd Cir. 1993) the district court dismissed a former lay teacher's action against a parochial school claiming discrimination in violation of the Age Discrimination in Employment Act and appeal was taken. The appeal raised the question of whether the federal Act applied to an action brought by a lay teacher against his parochial school employer.

The decision quoted with approval from *Lemon* but reversed the district court and remanded for further proceedings, rejecting the argument of the Holy Cross School that application of the Act in such circumstance would create a substantial risk of violating the excessive entanglement prohibition of the Establishment Clause. *DeMarco* at 168-169.

It is significant for present purposes that the *DeMarco* Court based its conclusion on the fact that application of the Act in the case of teacher DeMarco would not result in "ongoing government supervision" and the government's investigation of a discrimination claim would be "the limited inquiry required in anti-discrimination disputes". *Ibid.* The Court distinguished *NLRB v. Catholic Bishop of Chicago,* 99 S. Ct. 1313 (1979) because the NLRB would be "continuously involved" in enforcing the National Labor Relations Act and resolving disputes arising thereunder in the future. In contrast, the *DeMarco* Court emphasized that actions brought under the Age Discrimination Employment Act "do not require extensive or continuous administrative or judicial intrusion into the functions of religious institutions." *DeMarco* at 170.

The prior lengthy discussion of the Church-State relationship arising from the Attorney General's interpretation of the Consumer Credit and Protection Act demonstrates that such relationship is similar to that in *Catholic Bishop* and distinguished from that in *DeMarco.*

In *Coulee Catholic Schools v. Labor and Industry Review Commission*, 768 N.W. 2d 868 (Wis. 2009), a circuit court affirmed the decision of the Labor Commission's denial of the Catholic school's request to dismiss a former teacher's employment based age discrimination claim and the school appealed to Wisconsin's Court of Appeals which then affirmed.

Upon further appeal the Wisconsin Supreme Court reversed and remanded the case to the circuit court. The decision concluded that both the Free Exercise Clause of the First Amendment of the United States Constitution and the Freedom of Conscience Clauses in the Wisconsin Constitution preclude employment discrimination claims under the state's Fair Employment Act "for employees whose positions are important and closely linked to the religious mission of a religious organization." *Coulee* at 892.

Significantly, the action was brought by a first-grade lay teacher. The decision found, echoing though not citing *Lemon*, that the Catholic school "was committed to a religious mission – the inculcation of the Catholic faith and worldview – and [the teacher's] position was important and closely linked to that mission." *Ibid.*

If the law is to remain vigilant in protecting religious freedom and in protecting religious institutions from substantial government intrusion over an indefinite period of time, it must continue to adhere to the constitutional prohibition against excessive Church-State entanglement. When the cumulative impact of the entire Church-State relationship arising under the Consumer Credit and Protection Act is revealed it becomes clear that the constitutional prohibition against excessive Church-State entanglement is violated.

Where the legislature has enacted statutes regulating religious schools, which explicitly exclude application of other statutes to such schools, it clearly has demonstrated an intent that other statutes, including the Consumer Credit and Protection Act, shall not apply to such schools. If "overlapping" application to religious schools were intended such application would still pose a substantial risk of excessive Church-State entanglement.

In addition, the nature and extent of the power which would accrue to the Office of the Attorney General under his view of Article 6 of the Act supports a conclusion that this was not the legislature's intent. Moreover, it underscores the substantial risk that his statutory construction will result in an impermissible intrusion into religious education and foster excessive Church-State entanglement.

Indeed, a panoramic view of the entire relationship between Church and State arising from application of the Consumer Credit and Protection Act to religious schools reveals, not

dimly but clearly, an excessive entanglement of government and religion which is prohibited under federal and state constitutions.

Accordingly, it is **ORDERED** that the Diocese's motion pursuant to Rule 12(b) of the Rules of Civil Procedure to dismiss the claims contained in the Attorney General's First Amended Complaint under the Consumer Credit and Protection Act is GRANTED.

The Clerk of this Court shall mail certified copies of this order to counsel of record for each party:

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11-6-2019

J.D. BEANE, Judge